

Dissenting Views to Accompany H.R. 1084, the “Volunteer Pilot Organization Protection Act”

H.R. 1084, the “Volunteer Pilot Organization Protection Act” is the product of overreaching by the Majority. It is a response to a hypothetical problem and does nothing but let insurance companies off the hook while potentially harming innocent victims. And it flies in the face of the Volunteer Protection Act, a bill Congress passed into law after eight years of debate extending over five Congresses. The Volunteer Protection Act was carefully deliberated and negotiated, and this bill wipes that slate clean and acts as if the Volunteer Protection Act never existed.

We oppose this bill for several reasons. First, it undoes the balance achieved in the Volunteer Protection Act by specifically exempting pilots and aircraft carriers from liability. Second, it not only applies to pilots, but also to staff, mission coordinators, officers and directors of volunteer pilot organizations, and referring agencies, whether for profit or not-for-profit. Third, it would leave innocent victims without recourse in some situations by reducing the standard of care applicable to pilots. H.R. 1084 also does nothing to tackle the real problem, which is the insurance industry’s failure to offer insurance to the volunteer pilot organizations. Finally, the bill is poorly drafted and includes loopholes that would insulate international terrorist organizations from liability and subjects innocent bystanders to harm without any recourse.

Description of Legislation

Section 2 of the bill, the “Findings and Purpose” section, contains four findings describing the benefits and services provided by nonprofit volunteer pilot organizations and states that these organizations “are no longer able to reasonably purchase non-owned aircraft liability insurance to provide liability protection, and thus face a highly detrimental liability risk.”

Section 3 of the bill amends the Volunteer Protection Act to provide a liability exemption when the harm was caused by a volunteer of a nonprofit volunteer pilot organization. Section 3 also carves out liability protection for the nonprofit volunteer pilot organization, the staff, mission coordinates, officers, directors, and referring agencies.

Background on The Volunteer Protection Act of 1997

The Volunteer Protection Act of 1997 was passed in an effort to help increase volunteerism because of a fear that people were deterred by the potential for personal liability. Specifically, the Act limited the liability of volunteers who are: (1) acting within the scope of their responsibilities; (2) properly licensed, certified, or authorized to act; (3) not causing harm by willful or criminal conduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual; and (4) not causing harm while operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator to possess a license or to maintain insurance.¹

¹42 U.S.C. § 14053 (2003).

In addition, the Act eliminates joint and several liability for non-economic damages with respect to volunteers and limits awards of punitive damages against volunteers by requiring the plaintiff to establish “by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.”

The Act preempts inconsistent state laws except to the extent that such laws provide additional protection from liability to volunteers. Moreover, the legislation specifically provides that it would not preempt a State law that (1) requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers; (2) makes the organization or entity liable for the acts or omissions of its volunteers to the same extent that an employer is liable for the acts or omissions of its employees (i.e. respondeat superior); (3) makes a limitation of liability inapplicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. The act also allows states to enact statutes voiding the new federal legal limitations, but only to the extent all of the parties to a particular action are citizens of the State.

Concerns with H.R. 1084

A. H.R. 1084 Undoes the Balance Achieved by the Volunteer Protection Act

As noted above, the Volunteer Protection Act specifically excludes harm caused while “operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator to possess a license or to maintain insurance.”² Unfortunately, H.R. 1084 completely undoes this decision. Volunteers operating aircrafts or motor vehicles were exempted from liability protection under the Act because of the concern that in highly dangerous activities (such as flying airplanes), states have made it clear that they intend to hold individuals responsible for the consequences of their negligence by mandating insurance. Congress obviously chose to trust states’ judgement in these cases. Similarly, because most individuals who fly already have insurance, Congress may not have viewed liability protection for airplane pilots as an incentive to volunteer.

In addition, Congress was also concerned that if it extended liability protection to volunteer operators of airplanes and automobiles, these organizations would not be able to provide a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of an organization or entity. Indeed, the Volunteer Protection Act does not preempt state legislation that provides for such protection. Thus, Congress exempted operators of airplanes from liability protection because they feared with the high rates of accidents involving airplanes, there was a potential that innocent victims could go uncompensated if volunteers did not possess insurance.

B. H.R. 1084 Goes Well Beyond Protecting Volunteers

²42 U.S.C. § 14053 (2003).

The 1997 Act excuses volunteers from negligence but holds organizations accountable if they act irresponsibly.³ By contrast, H.R. 1084 protects not just the volunteer, but also the staff, mission coordinator, officer, or director (whether volunteer or not) of the nonprofit organization. It also extends the protection to any referring agency (whether for-profit or non-profit). This provision is designed to protect the matching programs that bring together volunteer pilots.

As Professor Andrew Popper explained in his testimony before the Committee:

H.R. 1084 undercuts a fundamental premise of existing [sic] federal law, the 1997 Volunteer Protection Act. That legislation immunized negligent coaches, lawyers and doctors engaged in malpractice, and others who have trusting contact with vulnerable populations, on the premise that victims of such misconduct would still have recourse against the organizations who sponsored the immunized defendant-volunteers. If this bill passes, that protection will vanish. Under this bill, the pilots, as well as their organizations and sponsoring entities, would all be immunized. In short, those who are in need of emergency air service and must rely on volunteers would be in the hands of individuals and organizations who are unaccountable for negligent acts.⁴

C. H.R. 1084 Reduces the Standard of Care for Pilots

Finally, H.R. 1084 alters the standard of care normally applied to pilots. Under current law, owners and operators of private aircraft must exercise ordinary care, or reasonable care under the circumstances.⁵ However, a number of courts have held that operators of private aircraft must exercise the highest degree of care. Indeed, one court reasoned that the nature of the conveyance and the great danger involved required the utmost practical care and prudence for the safety of passengers, and that the defendant was bound to exercise the highest degree of human care, caution, and judgement consistent with the practical operation of the plane. No lesser degree of care and prudence would be adequate under the circumstances or commensurate with the danger involved.⁶

³Sec. 4(c) (“Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.”).

⁴*Increasing Volunteers by Reducing Legal Fears: Hearings on H.R. 1084, H.R. 3369, and H.R. 1787, Before the Comm. on the Judiciary*, 108th Cong. (statement of Andrew F. Popper, Professor, American University, Washington College of Law) (July 20, 2004).

⁵Brooks v. United States, 695 F.2d 984 (5th Cir. 1983). Owners sued in tort for property loss arising when a aircraft was badly damaged in a runway landing accident. The court noted that under Texas law, liability growing out of aircraft accidents is determined by ordinary rules of negligence.

⁶Dyer v. United States, 551 F. Supp. 1266 (W.D. Mich. 1982), applying federal and Michigan law.

Under H.R. 1084 by contrast, a volunteer pilot could only be held liable if harm was caused by “willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.”⁷ Thus, the standard of care would be uniformly altered for all pilots, regardless of their type of license, that are permitted to fly for a non-profit organization.

D. H.R. 1084 Ignores the Problem of Inadequate Insurance Coverage

The real problem facing the nonprofit volunteer pilot organization community is that these organizations cannot obtain insurance. This was the point of Edward Boyer’s testimony at the hearing on this bill: “[A]viation insurance has skyrocketed up in price and certain key products are no longer reasonably available to volunteer pilot organizations. . . . Now virtually all volunteer pilot organizations have no non-owned aircraft liability insurance.”⁸

At the markup of this bill, Rep. Scott offered an amendment that directs the Attorney General to conduct a study to determine the insurance situation. The study will include an analysis of whether or not insurance is available to these nonprofit volunteer pilot organizations, and if not, then why. If insurance is available, the study will determine if it is made available on reasonable terms. Finally, the study will determine if there is collusion among insurance companies not to offer insurance, and the extent to which the inability to obtain insurance has affected these organizations’ ability to operate.

The study is a good first step in figuring out the problem, but it should have been conducted before Congress decided to pass a bill limiting liability for all volunteers and organizations in the industry and diminishing the chances of holding anyone accountable when harm occurs.

E. Legislation is Poorly Drafted

As usual when it comes to “tort reform” proposals by the majority, this bill was poorly and hastily drafted and leaves all kinds of loopholes. For example, the bill does not address the situation of an innocent bystander who may be harmed by a volunteer pilot. While the bill attempts to address the situation between the pilots, the organizations, and the person in need of transport, it clearly does not contemplate the situation of someone outside that relationship, such as an innocent bystander. This is simply poor and thoughtless drafting.

Even more egregious, this poor drafting leaves a loophole for acts of domestic terrorism. Thus, if a pilot flying for a nonprofit volunteer pilot organization commits an act of domestic terrorism with an airplane, the organization will completely escape liability for the harm caused by such an act. This is simply irresponsible.

⁷42 USC § 14503.

⁸*Increasing Volunteers by Reducing Legal Fears: Hearings on H.R. 1084, H.R. 3369, and H.R. 1787, Before the Comm. on the Judiciary, 108th Cong. (statement of Edward R. Boyer) (July 20, 2004.)*

Conclusion

H.R. 1084 is overbroad and unnecessary. There have been no reported civil liability cases against a volunteer pilot or a volunteer pilot organization. In addition, 43 states have already passed legislation relating to volunteer liability; some states have included or separately passed protections for non-profit organizations. There is no need to preempt state laws in this case.

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